IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

V.

THE STATE OF TEXAS

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent, and respectfully files this response in opposition to Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are not yet reported and are printed herein in Appendix A. The original opinion affirming Petitioner's conviction was delivered on January 15, 1964. On March 11, 1964, the Court of Criminal Appeals of Texas overruled Petitioner's Motion for Rehearing. Petitioner's second motion for rehearing was denied without written opinion, but entered an order deleting a phrase from its opinion on rehearing. An Order Stay-

ing the Mandate was issued by the Court of Criminal Appeals on April 16, 1964.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on January 15, 1964. Petitioner's second Motion for Rehearing was denied without written opinion on April 15, 1964. The Court of Criminal Appeals of Texas stayed the issuing of its mandate on April 16, 1964. Petition for Writ of Certiorari was filed in this Court and this Court on October 12, 1964, requested Respondent to file a response to this Petition. The Petitioner has invoked the jurisdiction of this Court under Title 28, U.S.C.A., Section 1257(3). It is questioned by the Respondent that any substantial Federal question is presented for adjudication by the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

Was Petitioner denied due process of law and equal protection of the laws under the Fourteenth Amendment of the United States Constitution by the Court's refusal to permit him to interrogate members of the grand jury, who returned the indictment, for the purpose of ascertaining bias, prejudice or pre-conceived opinions as to the Petitioner's guilt?

II.

Whether the Trial Court denied Petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution in permitting live television of the argument of State's counsel and the return of the jury's verdict

and its acceptance by the Court, where such live coverage did not disrupt, interfere, or in any way prejudice Petitioner's right to a fair and impartial trial and where no harm is shown by Petitioner?

III.

Whether the Trial Court denied the Petitioner due process under the Fourteenth Amendment of the United States Constitution in overruling his second motion for continuance and motion for change of venue, said motions having been made after the jury panel had been selected and after each juror had satisfied the Court that he could render a fair and impartial verdict if taken as juror in the case?

IV.

Whether the Trial Court and the Court of Criminal Appeals denied Petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States under the first count of the indictment, for swindling, when there was sufficient evidence to support the offense charged in the indictment in said count?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1, reads in part as follows:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Article 339, Vernon's Annotated Code of Criminal Procedure

Qualifications

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 358, Vernon's Annotated Code of Criminal Procedure

Any person may challenge

"Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall upon his request be brought into court to make such challenge."

Article 361, Vernon's Annotated Code of Criminal Procedure

Challenge to array

"A challenge to the array shall be made in writ- for these causes only:

"1. That those summoned as grand jurors are not in fact those selected by the jury commissioners.

"2. In case of grand jurors summoned by order of the court, that the officer who summoned them had acted corruptly in summoning any one or more of them."

Article 362, Vernon's Annotated Code of Criminal Procedure

Challenge to juror

"A challenge to a particular grand juror may be made orally for the following causes only:

"1. That he is not a qualified grand juror.

"2. That he is the prosecutor upon an accusation against the person making the challenge.

"3. That he is related by consanguinity or affinity to one who has been held to bail or who is in confinement upon a criminal accusation."

Article 374, Vernon's Annotated Code of Criminal Procedure

Deliberations secret

"The deliberations of the grand jury shall be secret. Any grand juror or bailiff who divulges anything transpiring before them in the course of their official duties shall be liable to a fine as for contempt of the court, not exceeding one hundred

dollars, and to imprisonment not exceeding five days."

Article 560, Vernon's Annotated Code of Criminal Procedure

On court's own motion

"Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue."

Article 566, Vernon's Annotated Code of Criminal Procedure

If adjoining counties objectionable

"If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper."

Article 567, Vernon's Annotated Code of Criminal Procedure

Application may be controverted

"The credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person. The issue thus formed shall be tried by the judge, and the application granted or refused, as the laws and facts shall warrant."

STATEMENT OF THE CASE

Respondent denies each and every allegation of fact stated by Petitioner in his Petition except those facts supported by the record; and those facts specifically admitted by the Respondent.

Petitioner was convicted on his plea of not guilty in the Seventh Judicial District Court of Smith County, after a change of venue from Reeves County, for the offense of swindling under Chapter 16, Title 17 of the Texas Penal Code; his punishment was assessed at confinement in the penitentiary for a term of eight years.

The first count of the indicement, upon which Petitioner was convicted, alleged that Petitioner knowingly and by means of false pretenses and representations made to T. J. Wilson, induced Wilson to sign and delivered to him an instrument in writing of the value of more than Fifty ($50.00) Dollars which conveyed and secured a valuable right. The instrument described was a chattel mortgage from T. J. Wilson to Superior Manufacturing Company on 75—500 gallons Superior N.H.3 tanks, and 75 4-wheel Superior tanks, complete with tires, axles, wheels and hose assemblies. Serial numbers were set out in the chattel mortgage. The chattel mortgage secured an indebtedness of $121,850.00 on which there was a recitation of $27,350.00 down payment, making a balance owed by Wilson in the sum of $94,500.00, payable in monthly installments of $1,575.00 each.

It was further alleged that Petitioner did falsely and fraudulently represent to Wilson that by signing and executing the instrument he was purchasing the property and that the said property was security for the instrument in writing: that Wilson relied upon

such representations, when in truth and in fact he was not purchasing the property and said property did not secure said instrument and was not security thereon.

T. J. Wilson, the injured party, testified that he went to Petitioner's office, and that Harold Orr, Vice President of the Superior Tank & Manufacturing Company, was present (S.F. 39). Wilson had talked to Petitioner before about a lease-back agreement, and told Petitioner that he was not interested. They finally agreed Wilson was to purchase the property and Petitioner was to lease it. The lease rate would be the monthly payments (S.F. 41), and Wilson was to receive ten per cent of the purchase price as a bonus (S.F. 41). At Petitioner's request Wilson furnished a financial statement and signed some in blank because Petitioner said he needed more than one, and some would be filled out on an electric typewriter (S.F. 42). Orr told him that Superior Tank & Manufacturing Company would give him a letter indemnifying him for any loss. Petitioner gave Wilson a similar letter and Petitioner was going to make the down payment of $27,500.00. Petitioner was to give Orr a check and the injured party signed the chattel mortgage and other papers and returned them to Petitioner (S.F. 56). Petitioner and Orr told Wilson at the time that Wilson signed the chattel mortgage that the equipment was ready for delivery, and Wilson assumed it was at the Superior Tank & Manufacturing Company in Amarillo. Delivery was to be made to Hale County (S.F. 62). Wilson told him that he wanted the bonus in cash and not in products, therefore he received a check for $7,500.00 from Petitioner as payment for his entering into the transaction (S.F. 63). He received the indemnification letter from Orr (S.F. 64, St.Ex. 16) and

Petitioner volunteered to fly Wilson to see the equipment (S.F. 73). Wilson believed the equipment listed in the mortgage was in existence, as represented and he would not have signed the chattel mortgage had he known there was no such equipment in existence (S.F. 67, S.F. 72). Petitioner agreed to make the monthly payments or have his bookkeeper make them for him (S.F. 74).

Wilson testified that the entire transaction would have been his inducement for his signing and delivering the chattel mortgage, and not any one factor, so far as he was personally concerned. This included the explanation of all the previous talks down to the payment on the equipment (S.F. 208).

Petitioner stated that he had already sold the paper contract (S.F. 263).

It was shown that the down payment was not made on the mortgage contract (S.F. 263).

The check, including the sum of this transaction, from C.I.T. to Superior Tank & Manufacturing Company, was introduced and went to Texas Steel Company in the sum of $268.431.00 from Superior Manufacturing Company (S.F. 259), the check and proceeds were traced to Billie Sol Estes for $268.431.00 (S.F. 263-270).

Harold Orr testified that he was president of Superior Manufacturing Company and that he, McSpadden, and others purchased the company. He further testified that Petitioner said that he knew they had purchased the company with one and a half million dollars in "bogus" paper and that Petitioner wanted McSpadden and Orr to handle "bogus" transactions

for him (S.F. 313). The company was to handle contracts which contained fraudulent serial numbers (S.F. 316). Orr testified that Petitioner said that he wanted money for a down payment on grain elevators and that they worked together for some time. Later Petitioner wanted serial number plates (S.F. 344) and he asked that someone with a set of tools be sent to Pecos (S.F. 347). Further testifying, Petitioner said that he was taking an investigator around to see the equipment, and that they were changing serial numbers on tanks at Fabens and Anthony, Texas (S.F. 349). Orr met Wilson in Pecos and Petitioner wanted Wilson to purchase equipment from Superior and lease it back to Petitioner (S.F. 354). Petitioner then told Wilson that the equipment would be delivered to Hale County. Petitioner then signed the letter of guarantee and told Wilson that Superior would send them the same type of letter (S.F. 354), and that the equipment would be delivered that day or shortly thereafter (S.F. 356). Petitioner was to receive ten per cent as a bonus. Wilson signed the chattel mortgage, which was sent to C.I.T. On the contracts Superior received some $75,000.00 and Wilson sent the money to Petitioner. There was no down payment on the merchandise (S.F. 375); the down payment part was false. Orr was aware that there was not to be a down payment (S.F. 377) as the property was never delivered (S.F. 379). Superior had never manufactured tanks with the serial numbers as set out in a chattel mortgage (S.F. 382). Different numbers were made up with the lease agreement signed in his presence (S.F. 404).

Petitioner did not testify nor offer any evidence in his behalf.

REASONS FOR DENYING WRIT OF CERTIORARI

ARGUMENTS AND AUTHORITIES

I.

Petitioner was not denied due process of law by the Trial Court's refusal to permit his examination of the grand jurors as to bias and prejudice resulting from publicity.

The criminal procedure in the State of Texas regarding the examination of grand jurors is as follows:

Article 339, V.C.C.P., lists the qualifications of a grand juror, without any allusion to the matter of bias and prejudice.

Article 358, V.C.C.P., provides that before any grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard.

Under Article 361, V.C.C.P., a challenge to the array may be made that those summoned as grand jurors are not in fact those selected by the jury commission, or that the officer who summoned them acted corruptly in summoning any one or more of them. The grounds for challenge to a grand juror are set out in Article 362, V.C.C.P.; that he is not a qualified grand juror; that he is a prosecutor upon an accusation against a person making the challenge; that he is related by consanguinity or affinity to one who is being held on bail or who is in confinement upon a criminal accusation.

Article 374, V.C.C.P., provides that the deliberations of the grand jury shall be secret.

Under our statutes, bias or prejudice is not a specific ground for challenge of a grand juror in this State, and the Court did not err in refusing to permit Petitioner to examine the grand jurors with reference to such matters, prior to the return of the indictment. Article I, Section 10, Constitution of Texas, protects the right of an accused in all criminal prosecutions. We do not agree that it encompasses grand jury action or that such a construction given the statutes constitutes a denial of due process and equal protection of the law in violation of Article I, Section 10 of the Constitution of this State and in violation of the Constitution of the United States.

Beck v. Washington, 369 U.S. 541, 8th L.Ed.2d 98, 82 S.Ct. 955, cited by Petitioner, did not resolve this question and therefore is not controlling.

We do not agree that in (*Davis v. Texas*, 374 S.W.2d 242; *Carter v. Texas*, 39 Tex.Crim.Rep. 345, 48 S.W. 508 (1898)), the Texas Court by its decisions, despite the above statutes, permitted a challenge of the individual jurors upon the constitutional grounds for "bias and prejudice." The Court in those cases, in line with the Supreme Court of the United States, held that racial discrimination within the meaning of the Fourteenth Amendment in the selection of the grand jury panel renders void an indictment returned by such a body. In these cases motions were made to quash the indictments on the grounds of racial discrimination in the selection of the grand jury panel.

II.

Petitioner was not denied due process of law and

equal protection of the laws under the Fourteenth Amendment to the United States Constitution in permitting live television of the argument of State's counsel and the return of the jury's verdict and its acceptance by the Court, where such live coverage did not disrupt, interfere, or in any way prejudice Petitioner's right to a fair and impartial trial and where no harm is shown by Petitioner.

By Bills of Exception, Nos. 5 and 6, Petitioner complains of the Court's action in premitting live television of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the Nation both in and out of the presence of the jury, denied him due process of law under the Constitutions of this State and of the United States. He further contends that it was personally objectionable to Petitioner's counsel and that it violated Canon 35 of the American Bar Association Canons of Ethics. The Bills were qualified by the trial judge to show that the case was called September 25; that a live telecasting, radio broadcasting and press photography were permitted only on matters considered at that time, which was the motion not to allow telecasting, broadcasting or press photography, and the motion for continuance; that the only evidence offered was to prevent the telecasting, broadcasting by radio, and press photography; that the case was continued until October 22. Prior to the time of trial a booth had been constructed and placed in the rear of the courtroom of the same or near the color of the courtroom, with a small opening across the top for use of cameras.

That live telecasting and radio broadcasting were not permitted during the trial; that the only telecasting was on film without sound; that no broadcasting of the trial by radio was permitted; that the ABC,

NBC, CBS, and the television station in Tyler were allowed one camera each in the courtroom; that films were taken at different intervals during the day; that they were used later on regular newscasts; that the Court did not permit any cameras other than those that were noiseless; that there were no flood lights nor flashbulbs allowed to be used in the courtroom; that press photographers were not allowed inside the bar; that the Court did not permit any telecasting or photographing in the hallways leading into the courtroom on the second floor of the courthouse; that the Court did not permit live telecasting of arguments of State's counsel; that the arguments of Petitioner's counsel were not telecast or broadcast.

That there was not any televising at any time during the trial except from a booth in the rear of the courtroom during the argument of counsel. News photographers operated from the booth so that it would not interfere with nor detract from the attention of either the jurors or the attorneys.

That there was never at any time any radio broadcasting equipment in the courtroom; that there was some equipment in a room off the courtroom where there were periodic news reports given throughout the trial; that no witness requested not to be televised nor photographed while testifying, nor did any juror at any time make such request.

The State submits at the outset that Petitioner has shown no injury because of photographs being taken in the courtroom, nor has he shown any injury in the taking of photographs from the television booth; and it has not been shown that it affected the jury. Petitioner did not testify in the case nor offer any testimony, and it cannot be said that he or his witnesses

were burdened or hindered in any way by the presence of the cameras; there is no intimation in the record that a juror or witness was harmed or humiliated by reason of the telecast.

In *Ray v. State*, 221 S.W.2d 249, the Court of Criminal Appeals of Texas refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom. Another case in which photographs were taken, and the case was televised is *Farrar v. State*, 277 S.W.2d 114. There the Court of Criminal Appeals of Texas refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial in the absence of an objection and showing of injury to appellant.

No other Texas case was found on the subject.

In *High v. State*, 120 S.W.2d 24 (Supreme Court of Arkansas), appellant's counsel objected to the taking of a picture in the courtroom of appellant. The Court states, "I have already told him he could take the picture, but no one is required to have his or her picture taken, and the taking of picture has nothing whatever to do with the trial." The objection was overruled. The Supreme Court of Arkansas states, ". . . It was not shown to the jury, and if published in the newspapers, it did not reach the jury because the papers were excluded from them."

Associate Justice Frank H. Hall of the Supreme Court of Colorado, in an article entitled "*Colorado's Six Years Experience Without Judicial Canon 35*" in 48 American Bar Association Journal 1120, December,

1962, relates how no harm has been done by the use of the television and photographs in the courtroom.

In *20 Texas Bar Journal 438*, an article appears, "*A Free Trial v. The Free Press,*" by Herbert Brucker, Editor, Hartford Courant, wherein it is stated, "Indeed, you cannot have either a fair trial or a free press without the other. Unless we have fair trials, we shall not long have a free press. Unless we have a free press we shall not long have fair trials." He pointed out that Mr. Justice Holmes said in *Abrams v. The United States,* in 1919, " 'Time has upset many fighting faiths. We do best when we let all faiths and all facts—imperfect though they may be, out into the open.' "

See 35 Texas Law Review 429.

In *People v. Jelke,* New York Appellate Division. 130 N.Y.S.2d 662, the Supreme Court, Appellate Division, recognizes the inherent right of a judge to control the conduct of a trial over which he is presiding, the power to prevent disorder in the court and to exclude particular individuals, if good order requires it, or to clear the courtroom of spectators for a limited time when necessary to preserve order; however, the court held that the judge abused his discretion when he barred the press and the public from a courtroom during the presentation of the state's evidence. The court held that it was error for the judge to bar the press and to attempt to dictate what portion of the court proceedings should be made available to the public.

There is no showing in the present case that the jury knew the proceedings were being photographed by the television cameras. Assuming that they knew photo-

graphs were being taken by television cameras, they could not have known what was shown to the public, because in Texas jurors were kept together over night in felony cases.

If they had seen any of the proceedings on the newscasts, certainly Petitioner's able counsel would have that before this Court. How could Petitioner have been injured? Unless there was adverse publicity shown by the record to have infected the trial, making Petitioner's trial a meaningless formality, there is simply no basis for holding that Petitioner was denied due process. Here, of course, neither the filmed portions or the live broadcast was shown to the jury.

Pictures are of public interest. In this case they were shown to the public at intervals during the trial. Newspaper reports are given to the public at intervals during the trial. Neither was seen by the jury. How could either or both affect a verdict? Such has not been shown by Petitioner.

The Judicial Section of the State Bar at its annual Judges' Conference held in Brownsville in September, 1963, adopted a resolution concerning courtroom photography to the effect that control of trial coverage by various news media should be left to the trial courts; that they have the inherent power to exclude or control coverage in the proper case in the interest of justice. Bulletin, State Bar of Texas, Vol. 1, No. 1, October, 1963.

III.

Petitioner was not denied due process of law and equal protection of laws under the Fourteenth Amendment of the United States Constitution when the Court overruled his second motion for continuance and mo-

tion for change of venue, said motions having been made after the jury panel had been selected and after each juror had satisfied the Court that he could render a fair and impartial verdict if taken as juror in the case.

Petitioner complains, without suggestion from him as to where the case should be sent, that the Trial Court erred in overruling his Motions for Postponement and Change of Venue from Smith County to some other county in the State because of the widespread publicity which the case had received, thereby forcing him to accept jurors who, through radio, television, and other news media, had received inadmissible evidence which was not offered at the trial. In support of his contention, Petitioner introduced a list of exhibits which illustrate the State-wide publicity which the case had received and which showed that it was highly improbable that a jury selected from any one of the 254 counties in the State of Texas, would not have heard of Petitioner and his business ventures. While recognizing this problem Petitioner does not offer any plausible solution to the problem. Should he have not been tried merely because of his prominence and notoriety?

Petitioner's Motions for Postponement and Change of Venue were controverted by the State through its District Attorney and the affidavits of two citizens of Smith County who swore that in their opinion Petitioner could receive a fair and impartial trial in Smith County.

This cause was transferred from Reeves County to Smith County on July 23, 1962.

This cause was set for trial on September 24, 1962.

in Smith County. Upon Petitioner's motion, a postponement or continuance was granted until October 22, 1962. So that, in fact, his motion for postponement was a second motion, the case having been postponed by the Court on the motion of Petitioner, because of the absence of witnesses.

A motion for continuance on the grounds stated by Petitioner, is not a statutory motion but is addressed to the sound discretion of the trial judge. *Trapper v. State*, 84 S.W.2d 726; *Gordy v. State*, 268 S.W.2d 126; and *McIntyre v. State*, 360 S.W.2d 875.

No abuse of discretion by the Trial Court is shown.

For the situation where television publicity and newspaper publicity are asserted as grounds for continuance, see 39 A.L.R.2d 1342.

Petitioner insists that the Court's action in overruling his motion for change of venue presents error because the voir dire examination of the jurors reveals that nine members of the jury had read in newspapers and magazines and had heard on radio and television, purported facts about the case which would have been inadmissible upon the trial.

Respondent respectfully submits that the voir dire examination discloses that none of the jurrors was shown to have formed any opinion about the case that would influence their verdict. In the absence of such a showing they were not disqualified. *Herring v. State*, 302 S.W.2d 428; *Klinedinst v. State*, 265 S.W.2d 593; *Pugh v. State*, 186 S.W.2d 258.

Petitioner strongly relies on *Williams v. State*, 283 S.W.2d 239. In its opinion the Court of Criminal Appeals of Texas held as follows:

"The opinion in Williams v. State, supra, cited by appellant, is not to be construed as holding that a court is required to change venue in every case where some of the jurors have read or heard purported facts about the case which would be inadmissible upon the trial. The holding in the Williams case is confined to facts presented in that case, where we held it error to deny a change of venue. To reverse for failure to change venue it must be shown that prejudice reached the jury box. Everett v. State, 218 S.W.2d 471; Jones v. State, 243 S.W.2d 848; Johnson v. State, 244 S.W. 2d 235; Goleman v. State, 247 S.W.2d 119; Aaron v. State, 275 S.W.2d 693; Slater v. State, 317 S.W. 2d 203; Moon v. State, 331 S.W.2d 312; Philpot v. State, 332 S.W.2d 323.

"There is no such showing in the present case. No error is presented in the bill."

In *Williams v. State,* supra, wherein the facts were not discussed, the Court of Criminal Appeals stated that at least five members of the jury had read newspaper accounts of appellant's connection with the crime for which he was tried; that the nature of the news accounts must be specifically noted; that he did not testify. The newspaper accounts, three of them in the county of the trial, plus the Houston newspapers, were read; that the prospective jurors learned that appellant was an unemployed ex-convict who had been out of the penitentiary only five months; that in addition to confessing to the instant crime, he had confessed that, within two months prior to the commission of the crime, he had raped a 47-year-old grandmother and robbed her of $140; that he had been indicted for these other offenses; that he had been taken out of town by the officers while a large crowd had gathered at the jail; that the sheriff had stated, "It looked bad for a

while"; that sentiment was running high in Bay City and the sheriff had requested the newspaper not to publish the picture of appellant; that he was denied bail and he was being kept in an unidentified jail outside the county; that there had been many prowlings and peepings reported in the area where the two rapes had occurred; that the press considered the case against appellant one of the most vicious in recent Texas history; that none of these facts contained in newspaper accounts was admissible; that at least five members of the jury read such accounts prior to going into the jury box.

It should be pointed out that Williams was a Negro; accused of the rape of a white child, who was 14 years of age; that she was baby sitting with her sister's children; that the prosecutrix lived in a county of 23 or 24 thousand people; that she was a well-loved child in Matagorda County; that the sheriff had taken appellant to Wharton, and some people learned where he was; that the sheriff moved him to Richmond in Fort Bend County, and to Bay City only on the morning of the trial; that Bay City Tribune had a circulation of approximately 3,600; that the Houston Chronicle reported some of the articles. Mr. Russ Parker, reporter for the Bay City Daily Tribune, heard a couple of times that appellant should be hung without being tried; that he had published an article that a large crowd had gathered at the jail and at least one was armed.

In the present case there is testimony that Smith County has approximately 100,000 people; that the county from which the case was transferred was over 500 miles away; that none of the prospective jurors knew the appellant; that the record shows that T. J.

Wilson, the injured party, was from Reeves County; that there is no testimony that any of the prospective jurors knew him; that none of the facts of the case would show that it would arouse the citizenry to prejudge a case prior to its being transferred.

It would appear in the *Williams* case that there was probably a prejudice against the appellant and against him because of the crime alleged against him.

In the questioning of the voir dire in Smith County it is not shown that there was a prejudice against Petitioner because of the crime he had committed, for it was not known to the prospective jurors with what crime he was charged.

According to all of the clippings and the publicity given to the case, Petitioner is apparently contending that a fair trial could not be had in the State of Texas, and probably, in the United States, because of the publicity.

It should be pointed out that what the prospective jurors heard in the present case was not the purported facts in the case.

Petitioner does not show how many of the 87 jury panel had an opinion as to the guilt or innocence of the Petitioner.

For a reversal, prejudice must reach the jury box. *Slater v. State*, 317 S.W.2d 205; *Moon v. State*, 331 S.W.2d 212; *Aaron v. State*, 275 S.W.2d 693; *Johnson v. State*, 244 S.W.2d 235; *Jones v. State*, 243 S.W.2d 848; *Golemon v. State*, 247 S.W.2d 119. In *Everett v. State*, 218 S.W.2d 471, where practically all of the jurors had heard about the case and knew about the trial of another defendant in another trial and the

penalty assessed him, the jurors expressed opinions referring to the matter. A large number of jurors were examined. The special venire was exhausted and a second list of talesmen were brought before the jury; that the Court was unable to say, from a consideration of the entire proceedings, that the Trial Court abused its discretion in refusing to change venue.

In *Grace v. State*, 234 S.W. 541, the Petitioner was a Negro convicted for rape; his punishment was death. Some forty witnesses testified as to whether a fair trial could be had; there were a large number of newspaper accounts of the various stages of the progress of the case from its inception to the time of trial. The Court states that the newspaper articles appeared to be a fair statement of the facts as they transpired, were not inflammatory or written for the purpose of creating a prejudice against the accused, and that it was not presumed that a fairminded citizenship would necessarily become prejudiced against the accused by simply reading the accounts of the matter in the newspaper; that some of the persons had heard expressions unfavorable to the appellant; and the Court did not reverse the case.

Petitioner insists that the Court erred in overruling his challenge for cause of the veniremen, Robertson, Mallory, and Nutt, on the grounds that some had heard opinions expressed and felt they had opinions in the case. At no time did either state that such opinion would affect his verdict. Each stated that he could follow the law and the evidence submitted in the case.

Article 616, Sec. 13, V.C.C.P., provides:

"13. That from hearsay or otherwise there is established in the mind of the juror such a con-

clusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged."

As heretofore pointed out, neither of these jurors stated that his opinion would influence his verdict.

The record and bills show that the opinion, if any, was from newspaper accounts, television reports, magazine articles, and other hearsay about Billie Sol Estes, and not this particular case. Each stated that he could follow the evidence and the Court's charge.

The statute provides that under such circumstances "... the court, in its discretion, may admit him as competent to serve." There is no showing that the Trial Court abused its discretion.

In *Howell v. State*, 352 S.W.2d 110, a juror stated that he had an opinion as to the guilt or innocence of accused, but could lay aside anything he heard and decide the case from the evidence heard from the witness stand. This Court held that there was no showing

that the Trial Court abused its discretion in holding the juror qualified.

In *Pugh v. State*, 186 S.W.2d 258, the conviction was for the murder of a deputy sheriff. It was contended that error was committed in overruling a challenge for cause to the venireman Ray Nettles; the bill of exception showed that Nettles had formed some opinion from reading newspapers.

He states ". . . that if the evidence showed up like he read in the papers he would have that opinion still 'otherwise if there was other evidence it might do away with my opinion all together, I don't feel like I have any established opinion in my mind but naturally do have some kind of opinion as to the guilt or innocence of the defendant.' "

The bill in that case recited that he was forced to take objectionable jurors, two of whom had opinions in the case, and three others had heard facts and read accounts in papers.

Each one of the jurors selected in the case stated that any opinion he had was based upon newspaper accounts or mere hearsay; that each felt he could lay such aside and under an impartial verdict upon the law and the evidence, thus bringing themselves under Section 13 of Article 616, V.C.C.P.; that the admission of such jurors as competent to serve became a matter of discretion of the trial judge.

These prospective jurors who indicated that they had formed some opinion about the case stated that they could lay aside such opinion and follow the evidence and the Court's charge in rendering their verdict.

It is apparent that the Trial Court was satisfied that

each venireman who stated he had an opinion could lay the same aside and render a fair and impartial verdict upon the law and evidence. Under the record, no abuse or discretion is shown on the part of the Court in holding the veniremen qualified. *Burkhalter v. State*, 247 S.W. 529; *Pugh v. State*, 186 S.W.2d 258; *Klinedinst v. State*, supra; *Howell v. State*, 352 S.W.2d 110.

Petitioner complains that the Trial Court erred in overruling challenge for cause on eight other jurors who heard some information about Petitioner prior to trial that was admissible and no evidence was offered about such information at the trial.

Petitioner does not raise by Bill of Exception or otherwise that the Court's overruling his challenge for cause of these jurors forced Petitioner to take an objectionable juror as is required by *Wolfe v. State*, 178 S.W.2d 274. No harmful error being alleged in the bill, there is nothing presented for review.

In *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639, this court held as follows:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.
>
> "This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is suffi-

cient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. People of State of Illinois, 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; Reynolds v. United States, supra.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of the prisoner's life or liberty without due process of law.' Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166. As stated in Reynolds, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality. The question thus presented is one of mixed law and fact * * *.' At page 156 of 98 U.S. 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * *. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' At page 157 of 98 U.S. As was stated in Brown v. Allen, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469, the 'so-called mixed questions of the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore the duty of the Court of Appeals to independently evaluate the voir dire testimony of the impaneled jurors."

IV.

Whether the Trial Court and the Court of Criminal Appeals denied Petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States under the first count of the indictment,

for swindling, when there was sufficient evidence to support the offense charged in the indictment in said Court.

The first count of the indictment in this case alleges that the Petitioner by false pretext induced T. J. Wilson to part with the written instrument (chattel mortgage) set out in the indictment, which was the property of T. J. Wilson and had a value in excess of $50.00. Petitioner contends that State's Exhibit No. 15, (chattel mortgage) for a number of reasons, was not binding on T. J. Wilson as maker, and, therefore, the instrument had no value. The record clearly reflects that the chattel mortgage contract in question obligated T. J. Wilson to pay the sum of $94,500; that after he signed the same it was retyped at the direction of Orr and that Orr, upon instructions of Petitioner, signed or forged the name of T. J. Wilson to the retyped and corrected instrument and as retyped, sold by Superior Manufacturing Company to C.I.T. Corporation for $70,275. Such instrument was shown to have a value in excess of $50.00.

The instrument signed by T. J. Wilson obligated him to pay a large sum of money for property which did not exist, but which was mortgaged to secure the debt, which was of the value of over $50.00.

Respondent respectfully avers that Petitioner has been afforded all the aspects of due process of law and that his conviction does not violate the Fourteenth Amendment or any other requirement of the United States Constitution.

CONCLUSION

Respondent respectfully submits that the Petitioner has not raised a substantial Federal question, that his allegations lack merit; that they have been reviewed by the highest state court having criminal jurisdiction and fully refuted by the law and that for the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Allo B. Crow, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage Prepaid, to Mr. Hume Cofer and Mr. John D. Cofer, Attorneys for Petitioner, 1408 Capital National Bank Building, Austin, Texas.

ALLO B. CROW, JR.
Assistant Attorney General

APPENDIX A

Opinions Below

IN THE

COURT OF CRIMINAL APPEALS
OF TEXAS

No. 36,086

BILLIE SOL ESTES,

Appellant

vs.

STATE OF TEXAS,

Appellee

Appeal from Smith County

OPINION

The conviction is for swindling; the punishment, eight years' confinement in the penitentiary.

Trial was in the 7th Judicial District Court of Smith County, upon a change of venue from the 143rd Judicial District Court of Reeves County, on the court's own motion.

The indictment contained four counts, count 1 charging the offense of swindling; count 2, the offense of theft and counts 3 and 4, the offense of theft by bailee.

Upon the trial, counts 1, 2, and 3 were submitted to the jury, the state having abandoned count 4.

Count 1, under which appellant stands convicted, alleged, in substance, that on or about the 2nd day of March, 1961, the appellant did knowingly and by means of false pretenses and representations made to T. J. Wilson, induce Wilson to sign and deliver to him an instrument in writing of the value of more than $50,

which conveyed and secured a valuable right. The instrument set out in the indictment was a chattel mortgage from T. J. Wilson, as buyer and mortgagor, to Superior Manufacturing Company on:

"75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH

"75—4 wheel SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

"SERIAL NO'S. SF-17214-500 THRU SF-17288-500

"65—SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65-200 GALLON NH3 TANKS.

"TANK SERIAL NO'S. 8304 THRU 8368,"

for which, according to the terms of the mortgage, the mortgagor agreed to pay the sum of $121,850, the sum of $27,350 having been paid, leaving a balance owing by Wilson of $94,500, payable in monthly installments of $1,575 each.

It was alleged that appellant did falsely and fraudulently represent to Wilson that by signing and executing the instrument he was purchasing the property and that the said property was security for the instrument in writing; that Wilson relied upon such representations, when in truth and in fact he was not purchasing the property and said property did not secure said instrument and was not security thereon.

T. J. Wilson, called as a witness by the state, testified that he lived in Pecos and was engaged in the business of farming; that in January, 1961, appellant approached him relative to his using his (Wilson's)

credit in purchasing fertilizer tanks and applicators and leasing them back to appellant; that appellant offered him 10% of the purchase price as a bonus rental and asked Wilson to furnish him with a financial statement; that he furnished the financial statement and later left word at appellant's office that he was not interested in the proposition; that later, on March 7, 1961, he went to the appellant's office in Pecos, at which time Harold Orr, vice-president of the Superior Tank & Manufacturing Company, of Amarillo, was present; that appellant introduced him to Orr and after some discussion he told appellant he was not interested in the transaction; that appellant then stated he would make the down payment and would be liable for the entire purchase price of the equipment, and Orr stated he would give a letter from the Superior Manufacturing Company holding the witness harmless in the event appellant did not make the payments, and appellant stated he would give a like letter.

Wilson stated that, thereupon, it was agreed that he would purchase the equipment, and appellant handed him a chattel mortgage which he signed and delivered back to appellant. State's exhibit #15, upon being identified by the witness as the mortgage which he signed and delivered to appellant, was introduced in evidence. The mortgage which had been duly filed in the office of the county clerk was a mortgage executed by Wilson to Superior Manufacturing Company on the equipment described in the indictment, reciting a purchase price of $121,850, with a down payment of $27,350 and balance due of $94,500, payable in monthly installments of $1,575 each.

Wilson further testified that at the time he signed

and delivered the mortgage to appellant he received a check from him for $7,500 as payment for his entering into the transaction. He further testified that he signed the mortgage because of the representations made to him by appellant; that he was told that the equipment was ready for delivery and would be delivered the next morning in Hale County; that he believed the equipment listed in the mortgage was in existence, as represented, and that he would not have signed the mortgage had he known there was no such equipment in existence.

It was shown that no down payment was made on the mortgage contract. It was further shown that a check from C.I.T. Corporation, dated March 10, 1961, was issued to Superior Manufacturing Company in the amount of $268,431.76, for the purchase of four contracts, including the Wilson contract which was purchased for $70,275, and that the proceeds of a check issued by Superior Manufacturing Company on March 13, 1961, in the amount of $268,431.76, covering the four contracts, found its way into the bank account of appellant in Pecos, Texas, on March 15, 1961.

Harold Orr, called as a witness by the state, testified that he was president of the Superior Manufacturing Company and that he and his company had an arrangement with appellant whereby the company would sell equipment on bogus contracts containing fraudulent serial numbers and send the proceeds of such sales to appellant. Orr testified that in the transaction with the state's witness Wilson, it was represented that the tanks would be delivered that day or the next and that in the transaction Superior Manufacturing Company received $70,250 from C.I.T. Corporation, which money was sent to appellant. He further swore that the prop-

erty and equipment purchased by Wilson was never delivered; that, in fact, such property was never in existence; and that the company never manufactured any tanks having serial numbers indicated in state's exhibit #15. He stated that such numbers were "made up" and that, in fact, there was no such equipment.

Appellant did not testify and, other than certain exhibits introduced, offered no evidence in his behalf.

Appellant urges six points of error in support of his contention that certain actions and rulings of the court denied him a fair trial and due process of law under the Constitution of this State and the United States.

We shall discuss the contentions in the order in which the same were presented at the trial.

Presented by bystanders' bill of exception #1 and formal bill of exception #2, appellant's first contention is that the District Court of Reeves County erred in refusing to permit him to interrogate the grand jurors after they were impaneled and before they returned the indictment, as to their bias and prejudice against him because of widespread publicity given his case by the news media, and in later overruling his motion to quash and dismiss the indictment because of publicity in the case which, it is charged, denied him a fair and impartial hearing before the grand jury.

It is the appellant's contention that the court's action in refusing to permit his examination of the grand jurors as to bias and prejudice constituted a denial of due process and equal protection of the law.

Art. 339, V.A.C.C.P., lists the qualifications of a grand juror, without any allusion to the matter of bias and prejudice.

Art. 358, V.A.C.C.P., provides that before any grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard.

Under Art. 361, V.A.C.C.P., a challenge to the array may be made that those summoned as grand jurors are not in fact those selected by the jury commission, or that the officer who summoned them acted corruptly in summoning any one or more of them. The grounds for challenge to a grand juror are set out in Art. 362, V.A.C.C.P.: that he is not a qualified grand juror; that he is a prosecutor upon an accusation against a person making the challenge; that he is related by consanguinity or affinity to one who is being held on bail or who is in confinement upon a criminal accusation.

Art. 374, V.A.C.C.P., provides that the deliberations of the grand jury shall be secret.

Under the statutes, bias or prejudice is not a ground for challenge of a grand juror in this state, and the court did not err in refusing to permit appellant to examine the grand jurors with reference to such matters, prior to the return of the indictment against him.

We do not agree that such a construction given the statutes constitutes a denial of due process and equal protection of the law in violation of Art. 1, Sec. 10, of the Constitution of this State and in violation of the Constitution of the United States.

In Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955, cited by appellant, the Supreme Court did not hold that under the due process clause of the Fourteenth Amendment a state was required to furnish to an accused an unbiased grand jury but spe-

cifically stated that such was a question "upon which we do not remotely intimate any view . . ."

Error is urged by appellant in his bystanders' bill of exception #3 to the action of the District Court of Reeves County in changing venue of the cause, on its own motion, to Smith County.

The bill of exception and record reflect that prior to ordering the change of venue, a jury panel of thirty-two names had been selected in the trial of another criminal case then pending against appellant in said court. At such time, appellant asked permission to withdraw his announcement of ready and moved the court to pass the case until such time as conditions in the county resulting from publicity should abate. Thereupon, the court discharged the jury panel and announced his tentative decision to transfer the case and three other causes pending against appellant to Smith County.

Appellant filed his opposition to such a change of venue and attached the affidavits of three citizens of Smith County, which is more than five hundred miles from Reeves County, who swore that he could not get a fair and impartial trial in that county.

After a hearing in which the three compurgators testified in opposition to the change of venue, the court entered its order changing venue in the instant case and in three other cases pending against appellant—all upon new indictments that had been returned by the grand jury—to Smith County, which order recited that it appeared to the court that a trial, alike fair and impartial to the accused and to the state, could not be had in Reeves County because the case had received such widespread publicity in the county and because

of the special knowledge and information of the citizens of the county resulting from Reeves County being the residence of both the appellant and the state's witnesses. The court further found and recited in the order that the courthouse of Loving, being the nearest to the courthouse in Reeves County, was subject to the same objection; that a fair and impartial trial to the accused and to the state, alike, could not be had in that county; and that said condition existed in all other counties adjoining Reeves County and in the adjoining judicial districts.

The order entered by the court was in compliance with Arts. 560 and 566, V.A.C.C.P., which provide:

(Art. 560) "On court's own motion

"Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue."

(Art. 566) "If adjoining counties objectionable

"If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper."

It has been the holding of this court that under these articles the district judge is vested with a discretion which, although it is judicial and not a personal one, will not be interfered with unless abused. Mayhew v. State, 155 S.W. 191; Mills v. State, 59 S.W.2d 147.

In Spriggs v. State, 289 S.W.2d 272, we said:

> "There is perhaps no provision in our laws which places in the hands of a trial judge more inherent power than does this statute (Art. 560, supra), for he can exercise the authority there conferred when he is 'satisfied . . . from any cause' that a trial fair to the accused and to the state cannot be had in the county where the case is pending."

The record in the instant case, showing that before the court ordered venue changed on his own motion a jury panel had been selected in another case pending against appellant in Reeves County and discharged at his request because of widespread publicity in the county, demonstrates to us that the court did not abuse his discretion in changing the venue to Smith County.

By bills of exception #4 and #23, appellant complains of the court's action in overruling his motions, *made after the jury panel had been selected* in Smith County to discharge the panel and postpone the case or change the venue.

In the motions, appellant alleged that because of widespread publicity given to him and the case by the news media in Smith County, he could not receive a fair and impartial trial. It was alleged that of the sixty-one veniremen examined, all but six testified that they had read newspapers, followed television publicity, and received information from magazines and other sources as to matters of purported facts in the case which were not admissible at the trial. It was also alleged that of those selected on the panel, twenty-six members thereof testified that they had learned and received facts which were not admissible on the trial of the cause.

In support of such motions, numerous exhibits were offered, consisting of newspaper clippings and photo-

graphs concerning appellant and the case pending against him. Many of the newspaper clippings pertained to a grand jury investigation in Robertson County in connection with the death of one Henry Marshall, a United States Department of Agriculture employee, and connected appellant with the inquiry. Other articles dealt with the investigation of appellant's activities in Washington by congressional committees and the interest of both the President and the Attorney General of the United States in the investigation. Other newspaper articles dealt with the business dealings of appellant and his associates and criminal charges against them.

Appellant also called witnesses who resided in Smith County who testified that they had heard purported facts about the case on television and radio; that they had read purported facts about the case in the newspapers; and that they had heard the case discussed, and expressed the opinion that appellant could not receive a fair trial in the county.

The voir dire examination of the jury panel was adopted by appellant for purposes of the motion. Included in the record is the voir dire examination of thirty-two members of the panel. A reading of their voir dire examination reflects that most of them had read in newspapers or magazines or had heard on radio and television, including a telecast of the preliminary hearing on September 24 and 25, certain purported facts about the case, but each satisfied the court that he could lay aside any opinion he had formed about the case and render a fair and impartial verdict if taken as a juror in the case.

Appellant's motions for postponement and change of venue were controverted by the state through its

district attorney and the affidavit of two other citizens of Smith County who swore that in their opinion the appellant could receive a fair and impartial trial.

The motion for postponement was in fact a second motion, the case having been previously postponed by the court on motion of appellant, because of the absence of witnesses.

Such motion was not a statutory motion but was on grounds addressed to the discretion of the trial judge. Trapper v. State, 84 S.W.2d 726; Gordy v. State, 268 S.W.2d 126; and McIntyre v. State, 360 S.W.2d 875. A review of the record does not disclose an abuse of discretion by the trial court in refusing to postpone the case.

Appellant insists that the court's action in overruling his motion for change of venue presents error because the voir dire examination of the jurors reveals that nine members of the jury had read certain inadmissible facts about the case. Reliance is had upon Williams v. State, 283 S.W.2d 239, and to the rule stated in the syllabus, as follows:

> "Where voir dire examination revealed that at least five members of the jury selected to try rape case had read newspaper accounts containing inadmissible facts, and after defendant had used all his challenges he was required to accept juror who had read the accounts, it was reversible error to deny motion for change of venue."

While the voir dire examination of the nine jurors discloses that they had read in newspapers and magazines and heard on radio and television certain purported facts about the case which would have been inadmissible upon the trial, none of the jurors were

shown to have formed any opinion about the case that would influence their verdict. In the absence of such a showing they were not disqualified. Herring v. State, 302 S.W.2d 428; Klinedinst v. State, 265 S.W.2d 593; Pugh v. State, 186 S.W.2d 258.

The opinion in Williams v. State, supra, cited by appellant, is not to be construed as holding that a court is required to change venue in every case where some of the jurors have read or heard purported facts about the case which would be inadmissible upon the trial. The holding in the Williams case is confined to facts presented in that case, where we held it error to deny a change of venue. To reverse for failure to change venue it must be shown that prejudice reached the jury box. Everett v. State, 218 S.W.2d 471; Jones v. State, 243 S.W.2d 848; Johnson v. State, 244 S.W.2d 235; Golemon v. State, 247 S.W.2d 119; Aaron v. State, 275 S.W.2d 693; Slater v. State, 317 S.W.2d 203; Moon v. State, 331 S.W.2d 312; Philpot v. State, 332 S.W.2d 323.

There is no such showing in the present case. No error is present in the bill.

By bills of exception #8, 9, 12, 16, 17, 18, 20, 21 and 22, appellant insists that the court erred in overruling his challenge for cause to the veniremen Owens, Shapley, Johnson, Freeman, Conant, Betts, and Swann, all of whom appellant peremptorily challenged, and to the veniremen Robinson and Mallory, whom appellant was unable to strike (having exhausted his peremptory challenges) and who did serve on the jury, on the ground that all of the veniremen had formed opinions as to appellant's guilt, which would influence their verdict in the case.

Art. 616, V.A.C.C.P., enumerates the reasons for challenge for cause to any particular juror, and, in subdivision 13; provides:

> "That from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion, was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged."

We have carefully read the voir dire examination of each of the above-named veniremen. Some stated that they had formed no opinion as to the guilt or innocence of appellant, while others stated that from reading newspaper accounts and magazines and watching television, they had formed some opinion about the appellant and his guilt or innocence.

Those prospective jurors who indicated that they had formed some opinion about the case stated that they could lay such opinion aside and follow the evidence and the court's charge in rendering their verdict.

It is apparent that the trial court was satisfied that each venireman who stated he had an opinion could lay the same aside and render a fair and impartial verdict upon the law and evidence. Under the record, no abuse of discretion is shown on the part of the court in holding the veniremen qualified. Burkhalter v. State, 247 S.W. 539; Pugh v. State, 186 S.W.2d 258; Klinedinst v. State, supra; Howell v. State, 352 S.W.2d 110.

By formal bills of exception #10, 13, and 14, appellant complains that the court erred during the voir dire examination in interrogating and instructing some of the veniremen with reference to their qualification as prospective jurors in the case. It is appellant's contention that by such action the court conveyed to the jurors his opinion in the case, in violation of Art. 707, V.A.C.C.P.

The bills reflect that during the voir dire examination the court inquired of some of the veniremen if they could lay aside any opinion they had formed about the case and base their verdict upon the law and evidence; inquired of some if they had any opinion as to the guilt or innocence of appellant; instructed some of the veniremen that the indictment was no evidence of guilt and that they would be so instructed in the charge; asked if they could follow the court's instruction and not consider the indictment as any evidence of guilt; and instructed the veniremen that the burden of proof was on the state and it must prove the defendant guilty beyond a reasonable doubt.

The bills further reflect that in each instance when the court made an inquiry or gave an instruction, the prospective juror was in doubt as to his answers given to certain questions proponded to him by counsel.

Under the record, the court was well within his province in questioning the jurors and explaining to them various phases of the law governing the case. In 35 Tex. Jur. 2d 149, Sec. 97, it is stated:

> ". . . where the qualifications of a juror, and especially his mental attitude toward defendant, have been left in doubt by the examination of counsel, it is not only the right, but may also be the duty, of the judge to question the juror further."

See, also, King v. State, 64 S.W. 245.

We do not agree that the court's statements conveyed to the prospective jurors his opinion as to any phase of the case or the answers which they should give to the questions then being propounded to them.

By bills of exception #5 and 6, appellant complains of the court's action in permitting live television of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the nation, both in and out of the presence of the jury, denied him due process of law under the Constitution of this State and of the United States. It is contended that such action by the court required appellant to go to trial with the counsel of his choice, in violation of the ethical standards defined by Canon 35 of the American Bar Association, which seriously hampered counsel in the defense of appellant and denied to him full and adequate representation to which he was entitled under due process.

The bills of exception show that the case was first set for trial for September 24, 1962. On September 24 and 25, a hearing was held by the court on two motions filed by appellant. One motion was that no telecasting of the trial be permitted and the other was for a con-

tinuance. At the hearing, the court permitted live telecasting of the proceedings.

At the conclusion of the hearing, the court overruled appellant's motion that the trial not be telecast but granted the motion for continuance and reset the trial for October 22, 1962. On October 22, 1962, the case proceeded to trial on its merits.

Prior to the trial a booth was constructed and placed in the rear of the courtroom, painted the same color as the courtroom, with a small opening across the top for the use of cameras. During the trial, the court permitted telecasting of the proceedings by ABC, NBC, and CBS networks and KRLD television in Tyler, from the booth in the rear of the courtroom. Such telecasting was on film, without sound. The court did not permit telecasting in the hallway leading into the courtroom or on the second floor of the courthouse, where the courtroom was situated, in order that appellant and his attorneys would not be molested or harrassed in approaching and leaving the courtroom. No live telecasting of the proceedings was permitted by the court except the arguments of state's counsel and the return of the jury's verdict and its acceptance by the court. The arguments of appellant's counsel were not telecast, as requested by them. The bills certify that no juror or witness requested that he not be televised.

Under the facts certified, we fail to perceive any injury to the appellant as a result of the telecasting of the proceedings.

Appellant did not testify or call any witnesses, so it can not be said that he or his witnesses were burdened by the presence of cameras. There is no intimation in the record that any juror or witness was embarrassed or humiliated by reason of the telecast.

In Ray v. State, 221 S.W.2d 249, this court refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom.

In Farrar v. State, 277 S.W.2d 114, this court refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial, in the absence of an objection *and showing of injury to appellant.*

The manner in which the trial judge permitted and controlled telecasting of the instant trial was well within the supervision and control of such coverage granted to him under Canon XXVIII of the Canons of Judicial Ethics since approved by the Judicial Section of the State Bar of Texas.

The contention that appellant was denied full and adequate representation, because of his counsel's belief in Canon 35 of the American Bar Association barring photographs in the courtroom or broadcasting or telecasting court proceedings, is not borne out by the record. Of the many cases coming to this court, we know of no case where the accused received better or more efficient representation than did appellant in the present case.

By points of error #7 and 15, appellant complains of other rulings made by the court during the trial and of the court's charge to the jury.

It is first urged that the court erred in not requiring the state to elect upon which count in the indictment it would go to the jury in seeking a conviction of appellant. While separate offenses were charged in the three counts, only one act or transaction was alleged,

that being the acquisition by appellant of the instrument in writing.

Under the general rule in this state, the state is not required to elect where the same act or transaction is charged in different counts of an indictment to meet possible variations in the proof. See: 30 Tex. Jur. 2d, Sec. 46, pages 617-620; Davis v. State, 321 S.W.2d 873; McKinnon v. State, 261 S.W.2d 335.

We do not construe Art. 1549, V.A.P.C., as amended in 1943, which provides:

> "Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner that the acquisition thereof constitutes both swindling and some other offense, the party thus offending shall be amenable to prosecution at the state's election for swindling or for such other offense committed by him by the unlawful acquisition of said property in such manner,"

as requiring the state to elect as to which offense it would prosecute but only permitting the state to elect as to whether it would prosecute for swindling or some other offense. Prior to the 1943 amendment of the statute the state had no right to elect but was required to prosecute for the other offense. Nor do we agree that an election was required, because under the court's charge appellant could be convicted under any of the three counts submitted upon the law of co-principals. Johnson v. State, 8 S.W.2d 121, and the other authorities cited by appellant in support of his contention that the state should have been required to elect, in view of the court's charge on principals, are not here applicable, because, in the cases cited separate transactions and offenses are shown.

The court did not err in refusing to require the state to elect, and fully protected the appellant in instructing the jury in his charge that they could convict him only on one count in the event they found him guilty.

In his point of error VIII, appellant urges a fatal variance between the fraudulent inducement alleged in the indictment (that Wilson was induced to sign and deliver the mortgage upon appellant's representation that he was purchasing the property and that said property was security for the mortgage) and the proof offered upon the trial when Wilson testified that the entire transaction and not any one factor was the inducement for his entry into the transaction. While Wilson did testify that it was the entire transaction, including the $7,500 payment made to him and the representations of both appellant and Orr to him, which induced him to sign and deliver the mortgage, he swore positively that he signed the mortgage because of representations made to him by appellant that the property was ready for delivery and that he believed the property was in existence, as represented. In order to constitute swindling it is not necessary that the false pretense should be the sole inducement which moves the injured party to part with his property. 5 Branch's Ann. P.C.2d at p. 344, Sec. 2827; Blum v. State, 20 Tex. App. 578; McFarland v. State 75 S.W. 788; Noblitt v. State, 281 S.W. 849. A further claim of variance is urged by appellant because state's exhibit #15, introduced in evidence, bore a number: "5-601C (4-60)" in the left top corner of the instrument, which number was not set out in the indictment in copying the mortgage according to its tenor. Such variance was not fatal, as the number was not a material part of the instrument, proper, and it was unnecessary for the state to allege the number in the indict-

ment. 3 Branch's 2d, Sec. 1588; Anderson v. State, 161 S.W.2d 88; Pate v. State, 361 S.W.2d 875.

The further contention is made by appellant that state's exhibit #15, for various reasons, was not binding on Wilson as maker and therefore the instrument had no value. We need not discuss the reasons urged by appellant as to the invalidity of the instrument, as the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of $94,500 and that after he signed the same it was re-copied at the direction of Orr and, as re-copied, sold by Superior Manufacturing Company to C.I.T. Corporation for $70,275. Such instrument was shown to have a value in excess of $50.

Appellant's remaining points of error relate to the court's charge.

In his charge to the jury, the court defined the offense of swindling substantially as the same is defined in Art. 1545, V.A.P.C., and set out in the charge seven essential elements of the offense. While the court's definition omitted the words, "goods," "services," and "any other thing of value," found in the statute, such omission was not called to the court's attention and does not present reversible error. The court also fully charged the jury on the law of principals.

In paragraph 3 of the charge, the court submitted to the jury the issue of appellant's guilt under count 1 of the indictment and instructed the jury that if they believed from the evidence beyond a reasonable doubt that the appellant either himself or acting as a principal, as the term was defined for them, on the date alleged,

"by means of the alleged false pretenses, devices

and fraudulent representations specifically set out in the *first count* of the indictment, did then and there by means of said false pretenses, devices and fraudulent representations, if any, acquire from the said T. J. Wilson said instrument of writing with said signature affixed thereto, and you further believe, beyond a reasonable doubt, that said false pretenses, devises and representations, if any, were relied upon by T. J. Wilson, and did induce the said T. J. Wilson to sign and place his, the said T. J. Wilson's signature on the instrument of writing, alleged in the indictment, and did induce the said T. J. Wilson to deliver to him, the said BILLIE SOL ESTES, said instrument of writing with the intent to appropriate the said instrument of writing to the said BILLIE SOL ESTES' own use, and that said instrument of writing conveyed and secured a valuable right, and that said instrument of writing was then and there of the value of more than $50.00 and was the property of T. J. Wilson, and the said BILLIE SOL ESTES did so acquire said instrument of writing by then and there falsely pretending and fraudulently representing to the said T. J. Wilson that he, the said T. J. Wilson, by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, and that said property, as listed and specified in said instrument of writing, secured said instrument of writing and was the security thereon, then you will find the Defendant guilty of swindling as charged in the first count of the indictment and assess his punishment at confinement in the State Penitentiary for a term of not less than two nor more than ten years. Unless you so find, or if you have a reasonable doubt thereof, you will acquit the Defendant."

In paragraph 4, the court instructed the jury that if they believed from the evidence or had a reasonable

doubt thereof that appellant did not by means of the alleged false pretenses and devices induce Wilson to sign and place his name on the instrument or that the appellant did not make any false pretenses or representations to Wilson, or if they believed that appellant at the time of receiving the instrument had no intent to appropriate it to his own use and benefit, or if they believed that the said instrument of writing did not convey or secure a valuable right and that said instrument was not of the value of more than $50, or if they believed that the instrument of writing was not the property of T. J. Wilson, they should acquit the appellant and say by their verdict, "Not Guilty."

In paragraphs 21-A, 21-B, 21-C, 21-D, 21-E, and 21-F, the court submitted certain affirmative defenses to the jury.

In paragraph 21-A, the jury were told to acquit appellant if they believed from the evidence or had a reasonable doubt thereof that when Wilson signed, executed, and delivered state's exhibit #15, he knew he was not purchasing the property specified therein.

In paragraphs 21-B, 21-C, 21-D, 21-E, and 21-F, the jury were told that if they believed from the evidence or had a reasonable doubt thereof that the sole reason or reasons for Wilson's signing state's exhibit #15 was the payment of $7,500 by the appellant to him or because appellant executed and delivered to him his written contract of equipment lease covering the identical equipment described therein, or because Superior Manufacturing Company gave him a letter of indemnity, or because appellant promised to pay all installments to become due on state's exhibit #15, then to acquit him of the offense charged in count 1 of the indictment.

Appellant insists that the court erred in submitting such defensive issues upon the theory of "sole reason" for Wilson's signing state exhibit #15, rather than upon the theory of "inducing cause," as requested by him in his requested charges #3, 4, 5, 6 and 7. The requested charges would have instructed the jury to acquit appellant if they found that Wilson was induced to enter into the transaction and sign state's exhibit #15 because of the $7,500 payment or certain other specified reasons but for which he would not have executed the same.

We are unable to agree that the theory upon which the court submitted the affirmative defenses was erroneous. The ultimate issue to be determined by the jury was whether the alleged false pretext was an inducing cause for Wilson's entering into the transaction. If there were other inducements which were the "sole reasons" for Wilson entering into the transaction, no offense was committed and appellant was entitled to an acquittal. This theory was given to him in the affirmative defenses submitted by the court.

In the cases relied upon by appellant, a defensive issue raised by the evidence was not submitted to the jury. Such is not the case at bar, because, as shown above, every affirmative defense raised by the evidence was submitted to the jury.

Complaint is made to the court's refusal to give certain defensive charges requested by appellant. We have examined each requested charge and find no reversible error in the court's action in refusing to give the same. Some of the charges would have been upon the weight of the evidence. Some were not called for by the evidence and the others were adequately covered

by the affirmative defensive issues submitted to the jury.

The court's failure to define the term "property," as defined in Art. 1418, V.A.P.C., does not present error. Under the indictment and court's charge the jury were required to find, before convicting, that appellant did by means of false pretenses and fraudulent representations acquire the *instrument of writing* set out in the indictment. A definition of "property" would not have aided the jury in passing upon the issue.

Nor did the court err in refusing to instruct the jury that the state's witnesses C. M. Wesson and Adam Garcia, both of whom were employees of appellant, were accomplice witnesses as a matter of law. While Wesson testified that, after the date of the alleged offense, at appellant's request and direction, he changed certain serial numbers on anhydrous tanks, and Garcia testified that he changed certain numbers under Wesson's direction, neither witness was shown to have had any knowledge of the representations made by appellant to the injured party, Wilson. The court correctly submitted to the jury the issue as to their being accomplices and did not err in refusing to instruct the jury that they were accomplices as a matter of law.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered January 15, 1964)

Opinion approved by the court.

CONCURRING OPINION

In view of the fact that I prepared for the Court the opinion in Williams v. State, 283 S.W.2d 239, and because appellant relies so strongly upon such case, I deem it proper to make the following observations.

The record in Williams reflects that the case had received publicity only in Matagorda County newspapers and in the adjacent area. The offense was committed; the case tried in Matagorda County, and the jurors stated they had read newspaper accounts of the case, and the voir dire examination revealed that they did not enter the jury box with open minds. After the reversal by this Court with instructions to change the venue, Williams was again tried, this time in Wharton County (Williams v. State, 298 S.W.2d 590), and there was an absence of any showing that the Wharton County jury did not enter the jury box with an open mind.

Appellant contends, without any suggestion from him as to where the case should be sent, that the court erred in overruling his motion to change venue from Smith County to some other county in the State because of the widespread publicity which the case had received, and that he was thereby forced to accept jurors who, through news sources, had received inadmissible evidence which was not offered at the trial. The answer to this contention would seem to lie in the exhibits introduced by appellant which illustrate the state-wide publicity which the case had received and which would render it highly improbable that a jury selected from the citizenry of any of our 253 counties other than Smith, where he was tried, would not contain a sizable number who had heard of appellant and

his far-flung financial manipulations. Appellant's counsel seems to recognize this fact, because he states in his brief that "Probably no case in this state has ever received the publicity treatment that this case received during the spring, summer and fall of 1962." I quote further from his brief:

> "The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon the Estes story giving in detail his life history and the details of the alleged fraudulent transactions out of which this prosecution arose. Said story carried full photographs and illustrations of the defendant's alleged fabulous and fraudulent career.
>
> The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story."

He poses a dilemma, but does not offer a solution.

The wheels of justice must not stop merely because an accused is of such prominence that he and his alleged misdeeds have been publicized throughout the state. The Supreme Court of Louisiana was confronted with such a problem in State v. Rini, 95 So. 400. See also the recent case of State v. Odom, 369 S.W.2d 173, from the Supreme Court of Missouri in which the question is fully discussed. Venue should always be changed where the end sought to be accomplished may be achieved, as was done in the Williams case, but all those properly charged with crime must be tried and their guilt or innocence determined. From the record, it is apparent that nothing beneficial to appellant could be accomplished by changing venue countless times.

MORRISON, Judge

(Delivered January 15, 1964)

OPINION
ON APPLELLANT'S MOTION FOR REHEARING

This conviction was affirmed upon the opinion prepared by Commissioner Dice, approved by the three Judges of this Court. The Concurring Opinion sets out the further views of Judge Morrison.

The opinion prepared by Commissioner Dice is attacked upon numerous grounds.

The motion for rehearing first complains that we erroneously stated that Exhibit 15 pleaded in the indictment was purchased by C.I.T. Corporation for $70,275.

We said: "- - - the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of $94,500 and that after he signed the same it *was re-copied* at the direction of Orr and, *as re-copied*, sold by Superior Manufacturing Company to C.I.T. Corporation for $70,275 - - -."

The appellant correctly points out that the instrument signed by Wilson and set out in the indictment was re-typed to correct the description "75—500 gallon Superior NH 3 tanks mounted on and together with 75—4 wheel Superior *tanks*," by changing the last word, "tanks," to "trailers," and that Orr, upon the instruction of the appellant, signed or forged the name of Wilson to the re-typed and corrected instrument and it was this instrument that was sold to C.I.T. Corporation.

The fact that the instrument described in the indictment and signed by Wilson was not itself sold and delivered to the C.I.T. Corporation does not affect our conclusion that the instrument signed by Wilson which

obligated him to pay a large sum of money for property which did not exist, but which was mortgaged to secure the debt, was of the value of over $50. Wilson's financial statement is in the record and he testified as to its accuracy. He testified that as he left appellant's office, after signing the instrument, he heard the appellant say "- - - he had my paper sold to C.I.T."

The appellant challenges our disposition of his bills of exceptions relating to the refusal of the court to permit him to interrogate the grand jurors in Reeves County.

We disclaim any intention of holding contrary to our prior decisions in Davis v. State, 374 S.W.2d 242, and other cases. Cognizance will be taken and relief afforded against the organization of grand juries under circumstances violative of the Constitution.

A grand jury previously impaneled had indicted the appellant. He was not in custody or under bond to await the action of the grand jury impaneled in May. He sought to interrogate the grand jurors for the May Term when they reassembled in July.

Our holding is that the appellant was denied no constitutional or statutory right by the court's refusal to permit him to interrogate members of said grand jury for the purpose of ascertaining bias, prejudice or preconceived opinion as to the appellant's guilt and exercising challenges.

The clear distinguishment between the case before us and Davis v. State is that in the Davis case evidence adduced at the hearing of the defendant's motion to quash the indictment supported his contention that the grand jury which indicted him was organized under circumstances violative of the Constitution. In the rec-

ord before us no violation of the Constitution in the organization of the grand jury which indicted the appellant is shown.

The appellant's complaint to our disposition of his Bills of Exception 4 and 23 relating to the trial court's refusal to discharge the jury panel and postpone the trial or grant a change of venue from Smith County is predicated, in a large measure, upon the holding of this Court in Williams v. State, 283 S.W.2d 239.

The opinion in the Williams case was distinguished both in the Court's original opinion and by its author in his Concurrng opinion herein. It is the view of the writer that, insofar as it may be construed as requiring a change of venue because jurors must be accepted who have read newspaper accounts of the case containing inadmissible facts, the Williams case should be overruled.

We do not agree that the Supreme Court in Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639, adopted or announced such a rule. In that case the Supreme Court said that the failure to accord an accused a fair hearing violates even the minimal standards of due process: that a fair trial in a fair tribunal is a basic requirement of due process: that the jurors' verdict must be based upon the evidence developed at the trial, and that the theory of the law is that a juror who has formed an opinion cannot be impartial. The Supreme Court qualified the latter statement as follows:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in

the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U.S. 131, 31 L.Ed. 80, 8 S.Ct. 21, 22; Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021, 31 S.Ct. 2, 20 Ann. Cas. 1138; Reynolds v. United States (US) supra.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' Lisenba v. California, 314 U.S. 219, 236, 86 L.Ed. 166, 180, 62 S.Ct. 280. As stated in Reynolds, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily - - - raise the presumption of partiality. The question thus presented is one of mixed law and fact - - -.'

- - - 'The affirmative of the issue in upon the challenger. Unless he shows the actual exitence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside - - -. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' - - - As was stated in Brown v. Allen, 344 U.S. 443, 507, 97 L.Ed. 469, 515, 73 S.Ct. 397, the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of

Appeals to independently evaluate the voir dire testimony of the impaneled jurors."

In Irvin v. Dowd, venue was changed to an adjoining county. In the case before us venue was changed to Smith County, more than five hundred miles from Reeves County where the indictment was returned. The venue was changed on the court's own motion, the court having found that in Reeves County and in all counties adjoining, and in adjoining judicial districts, a trial fair alike to the state and the defendant could not be had.

The holding in Irvin v. Dowd closely parallels the Texas Statute (Art. 616 (13) V.A.C.C.P.) which provides that the court, if satisfied that he is impartial and will render an impartial verdict, may in its discretion, admit as competent to serve in the case a juror who, from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay has formed an opinion or a conclusion as to the guilt or innocence of the defendant where the juror states he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence.

Whether the trial judge abused his discretion in refusing to postpone the trial or change the venue from Smith County must be determined in the light of the fact that the trial was had more than five hundred miles from the county where the offense was allegedly committed and the indictment returned; the voir dire testimony of the impaneled jurors, and the fact that the newspaper accounts, telecasts, broadcasts and other hearsay upon which some of the jurors had formed an opinion were circulated generally throughout the state.

We find no support in the record for the contention made in the motion for rehearing: "Three of the jurors who actually served in this Estes case expressed opinions that defendant was guilty."

The appellant forcefully argues in favor of Canon 35, Canons of Judicial Ethics of the American Bar Association, and against the view that the supervision and control of broadcasting or televising of court proceedings shall be left to the trial judge who has the inherent power to exclude or control such coverage.

We are not called upon to pass upon the merits of Canon 35. It is not binding upon the courts of this state.

We remain convinced that the coverage of appellant's trial in the manner set out in our original opinion was not a violation of due process and equal protection of law or other constitutional safeguard.

We do not, as appellant suggests, hold that there is no county in Texas where the appellant could get a fair trial, nor do we agree with appellant's contention that he could not and did not get a fair trial in Smith County.

Remaining convinced that Judge Dice's opinion correctly disposes of the appeal, appellant's motion for rehearing is overruled.

WOODLEY, Presiding Judge

(Delivered March 11, 1964)